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No. 81-26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PATRICIA MARKOT, and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Petitioners,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the dismissal of a public high school teacher because of the use of a particular, reasonable teaching methodology is a violation of academic freedom under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the mid-year discharge of a public high school teacher because of the use of a particular, reasonable teaching methodology, where that methodology was previously approved by the public employer and was overtly used by other employees, is a violation of the right to due process under the Fourteenth Amendment to the United States Constitution.

Parties to the Proceedings

Patricia Markot and the Hawthorne Teachers Association,* petitioners-plaintiffs.

Robert N. Hausner, John B. Ingemi, Joseph Livatino and the Hawthorne Board of Education, respondents-defendants.

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* The Hawthorne Teachers Association is an affiliate of the New Jersey Education Association.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER THE USE OF A PARTICULAR, REASONABLE TEACHING METHODOLOGY IS A PROTECTED RIGHT OF ACADEMIC FREEDOM UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE METHODOLOGY IN QUESTION IS AS SUBSTANTIVELY IMPORTANT TO THE TEACHING PROCESS AS THE CONTENT OF THE LITERATURE BEING TAUGHT	6
CERTIORARI SHOULD BE GRANTED BECAUSE THE COURTS BELOW MISCONSTRUED THE CLEAR WEIGHT OF AUTHORITY WHICH AFFORDS CONSTITUTIONAL PROTECTION TO THE USE OF A PARTICULAR, REASONABLE TEACHING METHODOLOGY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION	9
THE INVOLUNTARY DISMISSAL OF PLAINTIFFS' COMPLAINT PURSUANT TO FED. R. CIV. P. 41(b) CREATES A SHARPER CONFLICT AMONG THE CIRCUITS WHICH CAN ONLY BE RESOLVED BY AN AUTHORITATIVE RULING OF THIS COURT	13
CONCLUSION	16

PAGE

APPENDIX:

A—Judgment of the United States Court of Appeals for the Third Circuit 1a

B—Opinion of the United States District Court for the District of New Jersey 3a

C—Judgment of the United States District Court for the District of New Jersey 14a

Table of Authorities

Cases Cited

Ahern v. Board of Education of the School District of Grand Island, 456 F. 2d 399 (8th Cir. 1972) ..10, 11, 14

Barenblatt v. United States, 360 U.S. 109 (1959) 7

Bartels v. State of Iowa, 262 U.S. 404 (1923) 7

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 10

Clark v. Holmes, 474 F. 2d 928 (7th Cir. 1972), cert. den., 411 U.S. 972 (1973) 14

Dean v. Simpson Independent School District (Slip Opinion at 11) (E.D. Tex. August 21, 1979) 12

East Hartford Education Association v. Board of Education of the Town of East Hartford, 562 F. 2d 838 (2nd Cir. 1977) 11, 12, 14

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 4

Epperson v. Arkansas, 393 U. S. 97 (1968) 7, 15

Healy v. James, 408 U.S. 169 (1972) 7

PAGE

Hetrick v. Martin, 480 F. 2d 705 (6th Cir. 1973), cert. den., 414 U.S. 1075 (1973) 10, 14

Keefe v. Geanakos, 418 F. 2d 359 (1st Cir. 1969) 8, 11, 12, 14

Keyishian v. Board of Regents, 385 U.S. 598 (1967) .. 7, 9, 12

Kingsville Independent School District v. Cooper, 611 F. 2d 1109 (5th Cir. 1980) 11, 14

Mailloux v. Kiley, 323 F. Supp. 1387 (1971), affirmed, 448 F. 2d 1242 (1st Cir. 1971) 7, 11, 12, 14

Meyer v. State of Nebraska, 262 U.S. 390 (1923) 7

Minarcini v. Strongsville City School District, 541 F. 2d 577 (6th Cir. 1976) 10, 11, 14

Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1980) 8, 11, 12

Pico v. Board of Education of Island Trees Union Free School District No. 26 (Slip Opinion at 6036-6037, 2nd Cir. October 2, 1980) 12

Presidents Council, District 25 v. Community School Board No. 25, 457 F. 2d 289 (2nd Cir. 1972), cert. den., 409 U.S. 998 (1972) 14

Shelton v. Tucker, 364 U.S. 479 (1960) 6

Sterzing v. Fort Bend Independent School Dist., 376 F. Supp. 657 (S.D. Tex. 1972) 8, 11, 12

Sweezy v. State of New Hampshire, 354 U.S. 234 (1957) 6, 7

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 7, 11

United States v. O'Malley, 383 U.S. 627 (1966) 15

PAGE

Webb v. Lake Mills Community School District, 344 F. Supp. 791 (N.D. Iowa 8th Cir. 1972) 11, 12, 14

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 7

Wilson v. Chancellor, 418 F. Supp. 1358 (D. Ore. 9th Cir. 1976) 8, 11, 14

United States Constitution Cited

First Amendment ..... i, 2-8, 10, 11, 13

Fourteenth Amendment ..... i, 4-6, 9, 12, 13

Sec. 1 3

Statutes Cited

28 U.S.C.:

Sec. 1254(1) 2

42 U.S.C. (Civil Rights Act of 1871):

Sec. 1983 4

Rules Cited

Fed. R. Civ. P.:

41(b) 5, 13

Rule 19(b) 15

NO.

IN THE

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OCTOBER TERM, 1981

PATRICIA MARKOT, and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Petitioners,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Patricia Markot and the Hawthorne Teachers Association, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 16, 1981.

Opinions Below

Petitioners request review of the unreported decision of the United States Court of Appeals for the Third Circuit entered on April 16, 1981 by way of judgment order and without opinion. (Docket No. 80-2504, Third Circuit, April 16, 1981). The judgment order is reproduced in the Appendix at p. 1a, *infra.*

The decision of the United States District Court for the District of New Jersey is unreported. The opinion of the District Court is reproduced in the Appendix at p. 3a, *infra,* and the judgment order at p. 14a, *infra.*

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 16, 1981. This petition for certiorari has been filed within 90 days of the date of said judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), which states:

> "cases in the courts of appeals may be reviewed by the Supreme Court . . .
>
> (1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exer-

> cise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This is a First and Fourteenth Amendment action brought by a public high school English teacher, Patricia Markot, and the teachers association of which she was a member, the Hawthorne Teachers Association, against her public employer, the Hawthorne Board of Education, a body corporate, and the principal, vice principal and former superintendent, individually. Petitioner was discharged in the middle of an academic year because of her use, on two occasions, of the teaching methodology of silent reading. Her use of that teaching technique, however, was in accordance with (a) her approved lesson plans, (b) the published course of study for English at the Hawthorne High School and (c) the established policy of the school administration.

Petitioners commenced this action in January, 1980 by filing a complaint in the United States District Court for the District of New Jersey. The jurisdiction of the District Court was invoked pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983, as an action arising under color of state law and under the First and Fourteenth Amendments to the United States Constitution for which petitioners sought declaratory and injunctive relief, reinstatement and compensatory and punitive damages. Although plaintiffs previously had commenced an action in the state courts in 1979, the prosecution of plaintiffs' federal claims was expressly reserved for proceedings in the courts of the United States pursuant to *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964).

Petitioners' case was presented in a non-jury trial in the United States District Court for the District of New Jersey. Petitioner Markot utilized the teaching technique of silent reading for a mere 20 minutes on each of two occasions during February, 1979, in connection with the teaching of the book *To Kill a Mockingbird.* She was subsequently instructed by the principal to discontinue use of the teaching technique of silent reading and, in accordance with that directive, never again used silent reading in her classroom. Nevertheless, she was discharged in the middle of the academic year approximately one week later, some ten days prior to acquisition of tenure, for the official reason that, ". . . the methodology of teaching of Patricia Markot, which included extensive implementation of silent reading, under the circumstances was not compatible with the best educational interests of the school district." The use of the teaching technique of silent reading, however, had been approved by petitioner's department chairman and was widely used by other teachers in the district. Unrebutted expert testi-

mony established the educational value and reasonableness of that teaching methodology, particularly with respect to the teaching of the novel as a form of literature and especially in light of the specific approval of that teaching technique by the published course of study for the English Department. Of equal importance was the conclusion by the expert that the particular teaching methodology used in silent reading was as substantively important to the quality of the learning process as the content of the novel itself.

Defendants thereafter moved for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b), arguing that plaintiffs' case failed to state a cause of action upon which relief could be granted. The District Court for the District of New Jersey granted defendants' motion for involuntary dismissal and held that the use of a particular, reasonable teaching methodology was not a protected right of academic freedom under the First and Fourteenth Amendments to the United States Constitution. The District Court, whose opinion appears in the Appendix at p. 3a, *infra*, found substantive distinction between restrictions placed upon the content of a particular course and the methodology employed to teach that content. The District Court further found that the frequent utilization of the silent reading teaching technique by other teachers in the district had no constitutional impact upon her dismissal and that no substantive due process rights were implicated as a result of her mid-year discharge for the reasons stated.

On appeal to the United States Court of Appeals for the Third Circuit, petitioners argued that the judgment of the District Court for the District of New Jersey should be reversed as a matter of law. The Third Circuit disagreed and entered judgment without opinion, summarily affirming the decision of the District Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve whether the use of a particular, reasonable teaching methodology is a protected right of academic freedom under the First and Fourteenth Amendments to the United States Constitution where the methodology in question is as substantively important to the teaching process as the content of the literature being taught.

The question of whether a particular teaching methodology, employed in a reasonable manner, is a protected right of academic freedom under the First and Fourteenth Amendments to the United States Constitution is an inquiry of substantial importance and widespread impact and one which is novel before this Court. The inquiry is particularly sharpened where the use of a given teaching methodology may be as critical to a substantive understanding of the literature being taught as the actual content of that literature. This issue is of great concern not only to the litigants, but also to public employees in general. The important questions of federal law raised by this petition require that this Court exercise its discretion and grant the issuance of a writ of certiorari.

This Court has long held that the vigilant protection of constitutionally guaranteed freedoms is "nowhere more vital than in the community of American schools," *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960), and that governmental intervention with constitutional rights of members of the academic community will be deemed particularly offensive where that interference threatens the flourishing of scholarship and free academic inquiry. *Sweezy* v. *State of New Hampshire,* 354 U.S. 234, 250 (1957);

Barenblatt v. *United States,* 360 U.S. 109, 129 (1959); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 637 (1943). Further, this Court has historically recognized the constitutional impermissibility of unreasonable restrictions placed upon the teaching of substantive content. *Meyer* v. *State of Nebraska,* 262 U.S. 390, 400-401 (1923); *Bartels* v. *State of Iowa,* 262 U.S. 404 (1923); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968).

It is now well-settled that the First Amendment to the United States Constitution will not countenance the imposition of rules or regulations "that case a pall of orthodoxy" over the classroom, *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967). The concern of this Court that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969), is reflected in the well-established doctrine of academic freedom. *Sweezy* v. *State of New Hampshire, supra; Keyishian* v. *Board of Regents, supra; Healy* v. *James,* 408 U.S. 169, 180-181 (1972). As this Court stated in *Healy* v. *James, supra,* "... we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." 408 U.S. at 180-181.

The District Court for the District of New Jersey reasoned that the apparent absence of restriction upon course content, as distinguished from the methodology used to teach that content, required a finding that no First Amendment values were implicated. That conclusion, however, is illogical and legally unsound once it is established, by competent expert testimony,* that the method of teach-

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* As to judicial directive concerning the propriety of expert testimony in an academic freedom setting and the significant weight to be afforded that testimony, see *Mailloux* v. *Kiley,* 323 F. Supp. 1387, 1390-1392 (1971); affirmed, 448 F. 2d 1242, 1243 (1st Cir. 1971).

ing a particular novel, in some cases, may be as important to a substantive comprehension of the literature in question as the actual content of the book being taught. The equation of methodology with content, in the appropriate case, is a well-recognized educational concept which now requires the analysis and guidance of this Court in light of the widespread impact of the constitutional implications of that concept upon public employees and public employers at large and, in particular, upon the professional educators and public school teachers of our nation.

Explicit judicial recognition has been given to the necessity of affording First Amendment protection to the use of a particular, reasonable teaching methodology. In *Wilson* v. *Chancellor*, 418 F. Supp. 1358 (D. Ore. 1976), a federal district court set forth the rationale for affording such protection:

> These cases* also recognize the validity of a popular maxim, "the medium is the message." *The expresser's medium can affect the persuasiveness of his message, the duration of its influence, and the size and type of audience which its reaches. The act of teaching is a form of expression, and the methods used in teaching are media.* Wilson's use of political speakers was his medium for teaching; similarly, the short story was Parducci's medium, the pamphlets were Sterzing's media, and the article containing the controversial words was Keefe's medium. *The various school boards which restricted*

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* *Keefe* v. *Geanakos*, 418 F. 2d 359 (1st Cir. 1969), *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970), and *Sterzing* v. *Fort Bend Independent School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972).

> *the media employed by Wilson here, and by Keefe, Parducci, and Sterzing in the cases cited, suppressed expression which the First Amendment protects.* 418 F.Supp. at 1363-1364 (emphasis added)

This Court should grant a writ of certiorari in this case in order to provide much needed guidance to public school teachers and professional educators who seek to utilize a particular, reasonable teaching methodology as well as to provide a directive to the lower federal courts which have been charged by this Court with the coveted protection of the classroom as "particularly the 'market-place of ideas.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

Certiorari should be granted because the courts below misconstrued the clear weight of authority which affords constitutional protection to the use of a particular, reasonable teaching methodology under the First and Fourteenth Amendments to the United States Constitution.

The District Court for the District of New Jersey found that the use of particular, reasonable teaching methodology was deserving of no constitutional protection and dismissed plaintiffs' complaint. That Court also held that petitioner's mid-year discharge as a result of her use of a previously approved and widely used teaching methodology implicated no Fourteenth Amendment due process considerations. The United States Court of Appeals for the Third Circuit summarily agreed, without opinion. These holdings, however, are legally unsupportable and are contrary to the clear weight of authority. This Court, accordingly, should grant a writ of certiorari in order to rectify the widespread, adverse impact of such a holding upon the professional educators of our nation's public schools.

The District Court reasoned that petitioner's use of a particular, reasonable teaching methodology implicated no First Amendment values, relying on *Hetrick* v. *Martin*, 480 F. 2d 705 (6th Cir. 1973), *cert.* den., 414 U.S. 1075 (1973) and *Ahern* v. *Board of Education of the School District of Grand Island*, 456 F. 2d 399 (8th Cir. 1972). Reliance on *Hetrick*, however, is legally unsound. First, the Court in that case was largely concerned with the absence of any expert testimony concerning the extent to which plaintiff's teaching methods were "acceptable . . . within the profession." 480 F. 2d at 709. In contrast to the plaintiff in *Hetrick*, petitioner Markot presented extensive expert testimony, unrebutted before the District Court, establishing that her use of the particular teaching methodology in question was not only reasonable, but educationally prudent. Secondly, the District Court for the District of New Jersey failed to recognize that *Hetrick* was decided in 1973, some three years prior to the decision by the same circuit court of appeals in *Minarcini* v. *Strongsville City School District*, 541 F. 2d 577 (6th Cir. 1976) in which the United States Court of Appeals for the Sixth Circuit affirmed the District Court's approval of constitutional protection of "individual teaching methodology." 541 F. 2d at 584.

Thirdly, the *Hetrick* Court clearly stated, see 480 F. 2d at 709, that its holding was compelled by the decision of this Court in *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972). The "only question" before this Court in *Roth*, however, was "whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year." 408 U.S. at 569. This Court specifically stated in its opinion that the issue of alleged violation of respondent's First Amendment right of academic freedom "is not now before us." 408 U.S. at 574. *Hetrick*, there-

fore, can provide no sound legal basis for the opinion and judgment of the District Court, or the summary affirmation of that opinion by the Third Circuit.

The District Court for the District of New Jersey also relied upon *Ahern* v. *Board of Education of the School District of Grand Island,* 456 F. 2d 399 (8th Cir. 1972) for the proposition that the use of a particular reasonable teaching methodology implicates no First Amendment values. *Ahern,* however, involved a plaintiff teacher who engaged in activity so disruptive of the daily functioning of the school system that an analysis of her conduct in light of the two-pronged test of *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 509 (1969), justified the failure of the United States Court of Appeals for the Eighth Circuit to invoke the constitutional protections to which the plaintiff otherwise would have been entitled.

The affirmation by the United States Court of Appeals for the Third Circuit of the District Court's dismissal of plaintiffs' complaint was also unsound because of the contrary weight of authority which holds that the use of a particular, reasonable teaching methodology is entitled to protections of federal constitutional dimension. *Keefe* v. *Geanakos,* 418 F. 2d 359 (1st Cir. 1969); *Mailloux* v. *Kiley,* 323 F. Supp. 1387 (D. Mass. 1971); affirmed, 448 F. 2d 1242, 1243 (1st Cir. 1971); *Parducci* v. *Rutland,* 316 F. Supp. 352 (M.D. Ala. 1970); *Sterzing* v. *Fort Bend Independent School District,* 376 F.Supp. 657 (S.D. Tex. 1972), remanded for reconsideration as to remedy only, 496 F. 2d 92 (5th Cir. 1974); *Kingsville Independent School District* v. *Cooper,* 611 F. 2d 1109 (5th Cir. 1980); *Minarcini* v. *Strongsville City School District,* 541 F. 2d 577 (6th Cir. 1976); *Webb* v. *Lake Mills Community School District,* 344 F.Supp. 791 (N.D. Iowa 1972); *Wilson* v. *Chancellor,* 418 F. Supp. 1358 (D. Ore. 1976); *East Hartford*

Education Association v. *Board of Education of the Town of East Hartford,* 562 F. 2d 838, 842-844 (2nd Cir. 1977).

The District Court for the District of New Jersey also reasoned that the summary discharge of petitioner Markot for using an approved teaching methodology which simultaneously was being used overtly by other employees, failed to implicate any due process considerations under the Fourteenth Amendment. As indicated, the United States Court of Appeals for the Third Circuit affirmed, without opinion. This result, however, is equally contrary to the weight of authority holding that the application, without warning, of a performance standard in direct opposition to prior policy constitutes a denial of substantive due process. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603-604 (1967); *Sterzing* v. *Fort Bend Independent School District,* 376 F. Supp. 657, 662 (S.D. Tex. 1972); *Mailloux* v. *Kiley,* 323 F.Supp. 1387, 1392; affirmed, 448 F. 2d 1242, 1243 (1st Cir. 1971); *Parducci* v. *Rutland,* 316 F.Supp. 352, 356-358 (N.D. Ala. 1970); *Keefe* v. *Geanakos,* 418 F.2d 359, 362 (1st Cir. 1969); *Dean* v. *Simpson Independent School District* (Slip Opinion at 11, August 21, 1979) (E.D. Tex.); *Webb* v. *Lake Mills Community School District,* 344 F.Supp. at 799, 804-805 (N.D. Iowa 1972); *Pico* v. *Board of Education of Island Trees Union Free School District No. 26* (Slip Opinion at 6036-6037, October 2, 1980) (2nd Cir.).

The holding of the court in *Sterzing* v. *Fort Bend Independent School District, supra,* is demonstrative of the weight of authority which was ignored by the Courts below in this case:

> The Court finds these rights to be evident, the substantive rights of a teacher to choose a teaching method, which, in the Court's view, on the basis of expert opinion, served a demonstrated educa-

> tional purpose, *and the procedural right of a teacher not to be discharged for the use of a teach-in method which was not proscribed by a regulation or definitive administrative action, and as to which it was not proven that he had notice that its use was prohibited.* 376 F.Supp. at 662. (emphasis added)

A writ of certiorari should issue so that this Court can provide much needed guidance to the lower federal courts and to professional educators concerning the extent of the protective ambit of First Amendment right of academic freedom.

The involuntary dismissal of plaintiffs' complaint pursuant to Fed. R. Civ. P. 41(b) creates a sharper conflict among the circuits which can only be resolved by an authoritative ruling of this Court.

There existed a conflict among the circuit courts prior to the initiation of this litigation concerning the recognition of a federal cause of action based upon the right of academic freedom under the First and Fourteenth Amendments and, in particular, based upon the right to utilize a particular, reasonable teaching methodology. That division among the circuit courts, however, has been made deeper by the ruling of the United States Court of Appeals for the Third Circuit in this case. Until the decision below dismissing plaintiffs' complaint for failure to state a federal cause of action, the Third Circuit had aligned itself neither with those circuits providing such relief nor with those denying the existence of such a cause of action. The resultant repudiation of a federal cause of action by the Third Circuit, however, has created a deepened conflict of greater import to federal litigants than

existed previously: the very existence of a federal cause of action concerning coveted First Amendment rights has now been jeopardized in a substantive manner.

Most courts, or courts within the respective circuits, hold that the use of a reasonable teaching methodology, particularly where that teaching method has been previously approved by the public employer and as to which no notice of disapproval has issued, invokes First and Fourteenth Amendment protection. *Keefe* v. *Geanakos,* 418 F. 2d 359 (1st Cir. 1969); *Mailloux* v. *Kiley,* 448 F. 2d 1241 (1st Cir. 1971); *East Hartford Education Association* v. *Board of Education of the Town of East Hartford,* 562 F. 2d 838 (2nd Cir. 1977); *Kingsville Independent School District* v. *Cooper,* 611 F. 2d 1109 (5th Cir. 1980); *Minarcini* v. *Strongsville City School District,* 541 F. 2d 577 (6th Cir. 1976); *Webb* v. *Lake Mills Community School District,* 344 F. Supp. 791 (N.D. Iowa 1972) (8th Cir.); *Wilson* v. *Chancellor,* 418 F. Supp. 1358 (D. Ore. 1976) (9th Cir.).

With the ruling in this case, however, the Third Circuit has aligned itself with those circuits in which it is held that no federal constitutional protections are implicated by the use of a particular, reasonable teaching methodology. *Presidents Council, District 25* v. *Community School Board No. 25,* 457 F. 2d 289 (2nd Cir. 1972), *cert.* den., 409 U.S. 998 (1972); *Hetrick* v. *Martin,* 480 F. 2d 705 (6th Cir. 1973), *cert.* den., 414 U.S. 1075 (1973); *Clark* v. *Holmes,* 474 F. 2d 928 (7th Cir. 1972), *cert.* den., 411 U.S. 972 (1973); *Ahern* v. *Board of Education of the School District of Grand Island,* 456 F. 2d 399 (8th Cir. 1972).

As a result of the decision below by the Third Circuit, an increasingly deeper division has developed among the circuits which can only be rectified by the issuance

of a writ of certiorari and subsequent guidance by this Court. This conflict has resulted in a glaring lack of uniformity throughout the federal system in which most circuits recognize the existence of a federal cause of action extending to protect the use of reasonable teaching methodology, while others do not. That conflict has also resulted in an increasing inability of professional educators in our public schools to reasonably know what teaching conduct is protected and what teaching conduct may result in termination of employment. The existence of such imprecise standards and the resultant potential for the imposition upon teachers of conditions restrictive of First Amendment academic freedom cannot be tolerated by this Court. *Epperson* v. *Arkansas,* 393 U.S. 97, 105, 107 (1968).

This case presents a more compelling reason for the issuance of a writ of certiorari than one which does not reveal such a severe dichotomy between the lower federal courts with respect to the existence of a federal cause of action in the first instance. The writ should issue for that reason, Rule 19(b); *United States* v. *O'Malley,* 383 U.S. 627, 630 (1966), and also since the issues presented herein are of widespread impact upon the professional educators and public school teachers of this nation.

It is respectfully submitted that the judgment of the United States Court of Appeals for the Third Circuit is constitutionally infirm.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: July 1, 1981

APPENDIX A

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 80-2504

MARKOT, PATRICIA, and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Appellants,

v.

HAUSNER, ROBERT N., Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District, and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 80-00255

Argued March 23, 1981

Appendix A

Before:

HUNTER, SLOVITER and WISDOM,* *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

JAMES HUNTER, III, *Circuit Judge*

Attest:

SALLY MAVOS, Clerk

Date: April 16, 1981

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* Honorable John M. Wisdom, United States Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX B

Oral Opinion of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

PATRICIA MARKOT and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Plaintiffs,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District, and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Defendants.

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(4.90)* Now, these are defendants' motions for involuntary dismissal of the plaintiffs' case pursuant to Rule 41(b)

* Figures in parentheses refer to each new page of the stenographic transcript.

Appendix B

of the Federal Rules of Civil Procedure. In accordance with that Rule, I hereby make the following findings of fact and conclusions of law:

(1) The plaintiff, Patricia Markot, hereinafter called "Markot," is a citizen of the State of New Jersey, was employed as a teacher of English at Hawthorne High School by Defendant Hawthorne Board of Education, hereinafter "Board," from March 1976 through February 20, 1979.

(4.91) (2) Markot was hired by the Board for the year 1978-'79 school year, by a written contract, for the period from September 1, 1978 to June 30, 1979. Under New Jersey law, she would have achieved tenure if she had remained in the Board's employ on March 8th, 1979.

(3) Markot is a member of Plaintiff Hawthorne Teachers Association, a co-plaintiff a (sic) duly-recognized and certified exclusive labor representative of the teachers employed by the Hawthorne Board of Education.

(4) Defendant, Robert Hausner, hereinafter "Hausner," has been employed by Defendant Board since February 1, 1979 as principal of the Hawthorne High School, and had direct supervisory authority over Markot.

(5) Plaintiff, John B. Ingemi, was at all relevant times employed by Defendant Board as the superintendent of schools for the Hawthorne School District, and was responsible for the general supervision of the district's schools.

(6) Defendant, Joseph Livatino, was (4.92) at all relevant times employed by Defendant Board as a vice principal of the Hawthorne High School, and had direct supervisory authority over Markot.

Appendix B

(7) Frank Krueger, "Krueger," was employed by Defendant Board as a department chairman of the English Department, and had direct supervisory authority over Markot.

(8) Pursuant to Board policy, Markot was required to submit her lesson plans to Krueger for approval.

(9) From time to time during the course of her employment by the Defendant Board, Markot used the teaching technique of in-class silent reading, with the knowledge of Krueger, she and her students participating therein.

(10) Other English teachers in Hawthorne High School, and some teachers in the elementary school, upon occasion had used in-class silent reading, and the technique is regarded by some educators, including experts, as a legitimate teaching technique.

(11) The technique of in-class silent reading was never either expressly or clearly impliedly approved by the Board for general use (4.93) in Hawthorne High School.

(12) On January 17, 1979, Krueger approved Markot's lesson plans for February 5th and 6th, 1979. Incorporating by reference lesson plans regarding the teaching of "To Kill a Mockingbird" which had originally been scheduled to be taught in October 1978, but had been rescheduled due to the unavailability of materials in October. (sic)

(13) The lesson plans for the teaching of the novel "To Kill a Mockingbird" had also been approved by Krueger on September 18, 1978.

(14) Those lesson plans included a notation "Some class time will be allowed from time to time for in-class silent reading."

Appendix B

(15) On February 1, 1979, Hausner was first employed as principal of the Hawthorne High School.

(16) Hausner observed Markot's Fourth Period English class on February 5th, 1979 for 20 minutes. And on February 6th for 20 minutes, each class period lasted 42 minutes.

(4.94) (17) During the portions of the class periods when Hausner observed Markot's Fourth Period English class, the class was engaged in silent reading of "To Kill a Mockingbird."

(18) By memorandum dated February 6, 1979, Hausner directed Markot to meet with him in his office, bringing her lesson plans for February 6th and 7th, as well as her unit plan on "To Kill a Mockingbird." The meeting took place on February 8, 1979.

(19) On February 6th Hausner had directed Markot not to use silent reading as a technique. As a result of Hausner's directive, Markot ceased using silent reading as a teaching technique.

(20) Hausner prepared a teacher appraisal, dated February 13, 1979, based upon his observations on February 5th and 6th. That evaluation indicated that Markot was not competent and noted that she needed improvement in 12 of 21 areas evaluated.

(21) The evaluation was sent to Markot with a letter from Hausner dated February 14, 1979, in which he informed her (4.95) that because of her unsatisfactory performance on two occasions, and a strong disagreement with educational philosophy in terms of what is construed by teacher responsibility and student learning, he was recommending to the Board of Education that her tenure be denied.

Appendix B

(22) Relying on Hausner's recommendation and teacher appraisal, Ingemi informed the plaintiff by letter dated February 15, 1979, that he would recommend to the Board that it terminate plaintiff's contract as a teaching staff member at its meeting to be held on February 20th.

(23) On February 20th, defendants met in closed session to discuss Markot's continued employment. Markot appeared accompanied by her representative.

(24) By letter dated February 27, 1979, Ingemi informed Markot that the Board had adopted a resolution terminating her employment the previous day, February 26th, and denying her tenure.

(25) The reasons given for the Board's action were that Markot's methodology, (4.96) including the use of silent reading, was not compatible with the best educational interests of the school district.

(26) The letters of Hausner and Ingemi, Hausner's teacher appraisal and the Board's resolution terminating plaintiff's employment have been placed in Markot's personnel file.

(27) The Hawthorne Board's action of termination was affirmed by the Commissioner of Education, who was in turn affirmed by the New Jersey State Board of Education. Both the Commissioner and the State Board approved the Hawthorne Board's determination that silent reading was not an approved teaching technique, and that philosophical differences existed between Markot and Hausner. Both appellate tribunals ruled that those factors justified the Hawthorne Board of Education action.

Conclusions of law:

Appendix B

This Court has jurisdiction over the parties and the subject matter of this litigation by reason of the provisions of 28 U.S.C. Section 1343, 2201 and 2202; and (4.97) 42 U.S.C. Sections 1983 and 1988; and the First and Fourteenth Amendments to the United States Constitution.

Both parties to this litigation have conceded, and this Court holds, that the primary ground upon which plaintiff's cause of action on Section 1983 rests is the First Amendment to the United States Constitution. Plaintiffs' argument is that Markot possesses a First Amendment right to and interest in the teaching of English literature by means of the technique of silent reading. This First Amendment argument has three components.

First, plaintiffs assert that Markot, as a matter of Federal constitutional (First Amendment) law, had a right to employ silent reading as a teaching method.

Second, plaintiffs claim that Markot's termination for exercising this alleged constitutional right deprived her of liberty in violation of the Fourteenth Amendment's guarantee of substantive due process.

Third, plaintiffs claim that Markot's termination for using silent reading denied (4.98) her the Fourteenth Amendment right to equal protection of the laws, in that other teachers at Hawthorne employed silent reading and were not terminated.

Additionally, plaintiffs claim that Markot had a substantive due process liberty interest in having her personnel file free of substantial false information, and a substantive due process property interest in her continued employment.

These legal assertions will be addressed seriatum:

Appendix B

(1) After a careful review of the cases cited by both sides to this controversy, this Court is of the opinion and so holds, that the First Amendment's protection of freedom of expression in the academic community does not extend to insulate from review by a teacher's superiors, the methods as opposed to the substantive content of her instruction. This Court is of the opinion that all of the cases cited in plaintiffs' brief which allegedly support plaintiffs' claim are distinguishable. In all of said cases, the courts were concerned (4.99) with and generally invalidated on First Amendment grounds, restrictions placed upon the content as opposed to the methodology of the teachers courses. For example, restrictions on the books he or she assigned, or upon the free discussion and dissemination by the teacher of politically controversial ideas. Plaintiffs' claim that a teacher's methodolgy is an issue of academic freedom within the intendment of the First Amendment, is simply unsupported in the holdings of the cases in plaintiff's own brief.

This Court finds reasoned guidance for its holding that the silent reading method implicates no First Amendment values in *Hetrick* v. *Martin*, 480 F.2d 705 (Sixth Circuit), *certiorari denied*, [414] U.S. 1075 (1973), and in *Ahern* v. *the Board of Education of Grand Island*, 456 F.2d 399 (Seventh Circuit 1971), cases which are not cited by the plaintiffs. In both of those cases the courts held that the non-tenured teachers in question had no First Amendment or substantive due process rights to pursue a method of teaching which contravened the (4.100) dictates of their employers regarding classroom procedures. *Hetrick, supra* at pages 708-09; *Ahern, supra* at 403 and 404.

This Court's holding is in no manner affected by the fact that several Hawthorne teachers have employed silent

reading. The mere fact that a person has engaged in a certain practice obviously does not talismanically convert that practice into a Federal constitutional right. See *Hetrick, supra* page 709. Constitutional rights do not emanate from custom or fashion.

Second, having concluded that Markot had no First Amendment right to employ silent reading as a teaching method, it follows that she was not deprived of liberty within the meaning of the Fourteenth Amendment, by not being permitted to use this method.

Three, plaintiffs' Fourteenth Amendment equal protection argument is also rejected. Since Markot neither asserted nor established the existence of any constitutional suspect classification, and since this Court has already concluded that she (4.101) has not been deprived of any fundamental constitutional right by not being permitted to use silent reading, the only inquiry is whether the Board's decision to terminate had a rational basis. *Harrah Independent School District* v. *Martin,* 440 U.S. 194, at 199 (1979), a *per curiam.* The Court concludes that the Board's decision was rational. Clearly the Board has the right and the authority to decide that it does not wish to employ a teacher who employs a teaching method dissonant to what the Board considers established and conventional practices. The fact that other teachers in Hawthorne occasionally employed silent reading, and that the method is accepted by some experts as valid, does not render the Board's decision irrational or arbitrary in a constitutional sense, for this Court has found no compelling evidence that the Board was aware of and approved the use of this method by teachers other than Markot. Again, just because Markot's teaching style is considered acceptable by some within the teaching profession does not mean that

the (4.102) Board acted arbitrarily in refusing to insulate her style from its review in determining whether she merited continued employment or tenured status. See *Hetrick,* again at 709.

Moreover, this Court will not undertake a *de novo* review of whether silent reading should be a teaching method approved by the Hawthorne Board, for this is precisely the sort of academic terrain upon which a Federal Court must not tread. *Doherty* v. *Rutgers School of Law Newark,* 487 Fed. Supp. 1291 at 1297 note 4, decision by this Judge. See also *Chung* v. *Park,* 514 F.2d, 382, at 387, note 8 (Third Circuit 1975); *Keddie* v. *Pennsylvania State University,* 412 Fed. Supp. 1254 at 1270 (Middle District of Pennsylvania 1976).

Four, Plaintiff Markot's claim that she possesses a substantive due process liberty interest in having her personnel file free of false information can be quickly disposed of. Plaintiff Markot would have cause to complain only if the file contained "substantially false information (4.103) with respect to her work performance or the reasons for her discharge." *Ledford* v. *DeLancey,* 612 F.2d 883, page 887 (Fourth Circuit 1980).

However, plaintiffs' claim regarding the personnel file hinges on the assumption that statements in the file that Markot was dismissed on account of her teaching method and her incompetence are substantially false. With regard to statements concerning her teaching method, the Court has already concluded that this was a rational reason for the Board to dismiss. Accordingly, these statements do not meet the "substantially false" requirement. With regard to statements in the file to the effect that Markot was dismissed for incompetence, the Court notes that such statements apparently represent the subjective judgment

of Markot's superiors, including the Board. This Court is not permitted to substitute its own subjective judgment, whatever it may be, of Markot's competence as a teacher for the judgments of her employer. See generally *Board of Curators of University of* (4.104) *Missouri* v. *Horowitz*, 435 U.S. 78, at page 91, (1978), quoting *Epperson* v. *Arkansas*, 393 U.S. 97, at page 104 (1968). Courts may not serve as super-tenure review committees. *Keddie, supra* at page 1270. Thus, the Court cannot hold that statements in Markot's personnel file impugning her competence, as a matter of law or fact, are substantially false. It follows that no substantive due process liberty interest of Markot's has been violated.

Five, turning finally to plaintiffs' claim that Markot had a substantive due process property right in continued employment, the short and dispositive answer to this is that she was non-tenured at the time of her dismissal, and thus had nothing more than a unilateral expectancy of continued employment.

Board of Regents v. *Roth*, 408 U.S. 564, page 577 (1972). Looking to New Jersey law, and I must under *Roth, supra*, this Court holds that plaintiff was an employee terminable at will, subject only to the contractual requirement that she be given 60 days notice. (4.105) See *Mozier* v. *Board of Education of Cherry Hill Township*, 450 Fed.Supp. 742 at 748, this court, (1977); *Canfield* v. *Board of Education of Pine Hill Borough*, 51 N.J. 400 (1968). In light of the above analysis, this Court does not reach the issue of collateral estoppel.

For all of the foregoing reasons, plaintiffs' complaint must be dismissed, with prejudice.

Appendix B

Exercising its discretion, the defendants' request for attorneys' fees under 42 U.S.C. 1988 are denied. Each side to bear its own costs.

Defendants shall prepare an appropriate order forthwith. So ordered.

(Court adjourned.)

APPENDIX C

Judgment of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

PATRICIA MARKOT and HAWTHORNE TEACHERS ASSOCIATION, a New Jersey Corporation,

Plaintiffs,

vs.

ROBERT N. HAUSNER, Principal of the Hawthorne High School, HAWTHORNE BOARD OF EDUCATION, JOHN B. INGEMI, former Superintendent of the Hawthorne School District, and JOSEPH LIVATINO, Vice Principal of the Hawthorne High School,

Defendants.

This matter having been tried before the Court on July 29 and 30, 1980 and August 4 and 5, 1980, and the plaintiffs having been represented by Greenberg & Mellk (William S. Greenberg, Esq. appearing) and defendants Hausner, Ingemi and Livatino being represented by Schenck, Price, Smith & King (David B. Rand, Esq. and Robert M. Tosti, Esq. appearing) and the defendant Hawthorne Board of Education being represented by Jeffer, Hopkinson & Vogel

(Reginald F. Hopkinson, Esq. appearing); and all defendants having moved for an involuntary dismissal of all claims asserted by plaintiffs at the conclusion of plaintiffs' case based upon the provisions of *Fed.R.Civ.P.* 41(b); and the Court, as the trier of fact, having considered the evidence presented during the plaintiffs' case as well as the applicable law, and having further rendered an oral decision in connection with the motion on August 5, 1980, which included findings of fact and conclusions of law as required by *Fed.R.Civ.P.* 52(a); and the Court having determined that upon the facts and the law plaintiffs have shown no right to relief and that defendants are entitled to a judgment of dismissal;

Now, Therefore, in accordance with the oral decision, findings of fact and conclusions of law rendered by the Court as aforesaid;

It Is on this 25 day of August, 1980, Ordered, Decreed and Adjudged that judgment of no cause for action be and is hereby entered in favor of all defendants dismissing with prejudice all claims asserted by plaintiffs against all defendants in this action; and

It Is Further Ordered that the within judgment of dismissal shall be without costs to any party and that defendants' application for counsel fees and costs as "prevailing parties" pursuant to the provisions of 42 U.S.C. §1988 be and is hereby denied.

Lawrence A. Whipple, U.S.D.J.